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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 30, Original

STATE OF MICHIGAN,

Plaintiff,

—VS—

STATE OF OHIO,

Defendant.

REPLY TO EXCEPTIONS TO REPORT AND RECOMMENDATIONS OF SPECIAL MASTER

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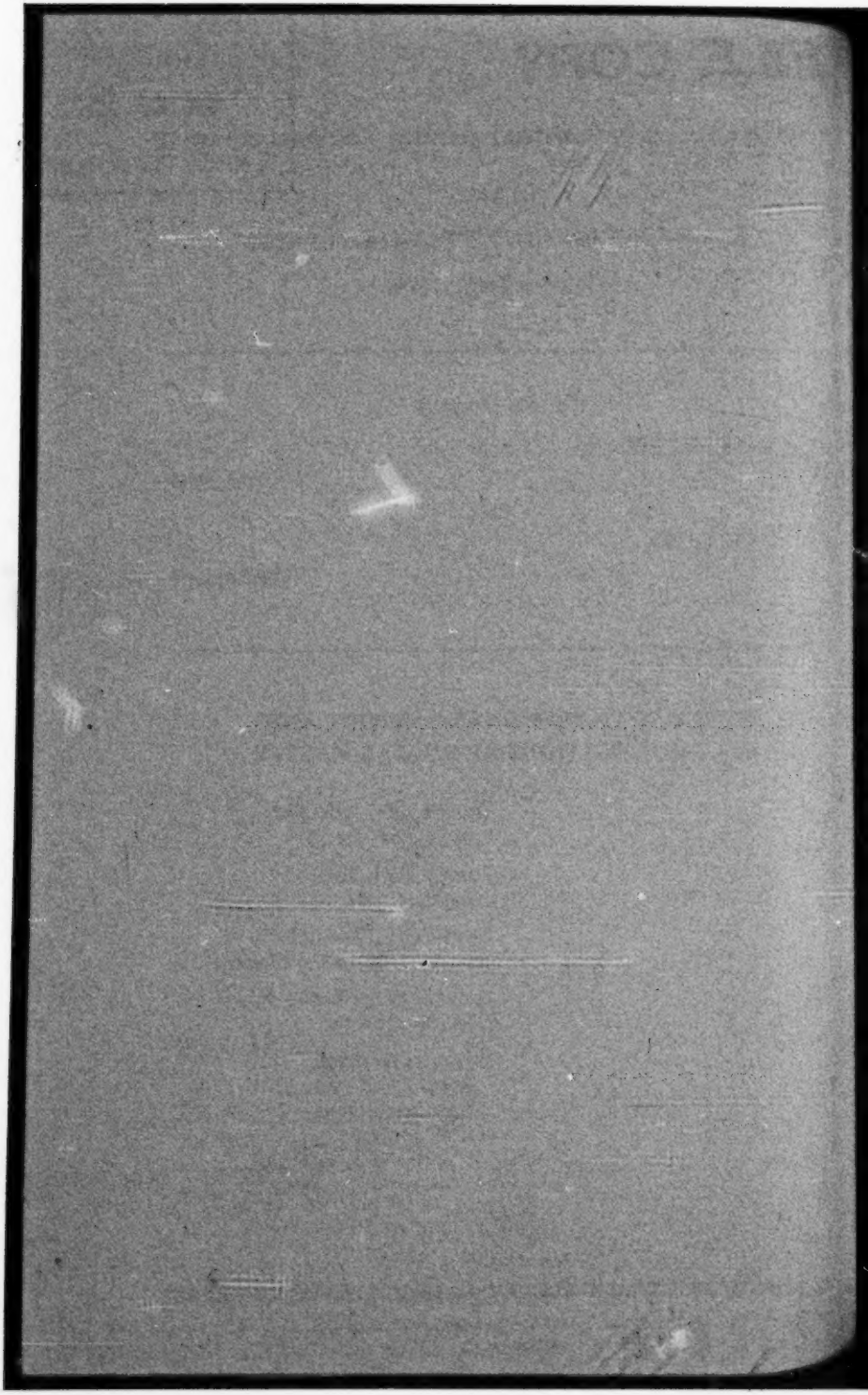

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TO THE HONORABLE
THE SUPREME COURT OF THE UNITED STATES

The State of Ohio, Defendant, by William J. Brown, its Attorney General, herein replies to the exceptions to Report and Recommendations of Albert B. Maris, Special Master, filed by Frank J. Kelly, Attorney General, State of Michigan.

I

The State of Michigan assigns as error the alleged failure of the Special Master to recommend a definition of the boundary line between Post 71, the easterly terminus monumenting the land boundary between Michigan and Ohio and the proper relocation of the north cape of the Maumee Bay as it existed in 1836. Michigan urges that the Special Master should have granted Paragraph No. 44 in Michigan's Proposed Findings of Fact.

The Special Master did conclude, in Finding of Fact No. 47, that the location of the north cape of Maumee Bay which Harris in 1817 determined to be the easterly terminus of the Ohio-Michigan land boundary as it existed in 1836, as closely as

it can now be ascertained, is the point now in the bed of Maumee Bay where a line drawn South 45° West through the center of the existing circular concrete sea wall on Turtle Island intersects a line drawn North 87° 49' 44" East from Post 71, the easternmost existing monument on the Ohio-Michigan land boundary line, both bearings being measured from a true meridian.

The Special Master states, on page 32 of his Discussion, that the land boundary, as monumented in 1915 under the auspices of the Joint Commission, as it approaches Post 71, follows a course having the bearing North 87° 49' 44" East. The Special Master further concluded that the same line extended eastwardly from Post 71 across Maumee Bay should pass through the 1836 location of the north cape of Maumee Bay since that was the original eastern terminus of the land boundary line. Thus the Special Master did define the boundary line between Post 71 and the north cape of the Maumee Bay or the point at which a line drawn South 45 degrees West through Turtle Island intersects the line extending eastwardly from Post 71.

The State of Ohio objected to proposed Finding of Fact of the State of Michigan 44 when it filed its Commentary upon proposed Findings and Conclusions of the State of Michigan on the ground that it was mere opinion testimony. We continue to object to it on that basis.

II

The State of Michigan excepts to Paragraph 2 of the Special Master's Recommended Decree. That Paragraph reads as follows:

> "2. In 1836 the north cape of Maumee Bay was located at the point in that Bay where a line drawn North 87° 49' 44" East from Post 71 on the Land boundary line between the States of Ohio and Michigan intersects the line drawn South 45° West from the center of the existing circular concrete sea wall on Turtle Island, both bearings being measured from a true meridian."

The State of Michigan further excepts to the failure of the Special Master to grant Michigan's request Findings of Fact Nos. 40, 41, 43 and 44. The Special Master correctly noted that the language in the act of June 15, 1836, 5 STAT. 49-50 determined the land boundary between Ohio and Michigan from the Indiana line to the north cape of Maumee Bay and also determined the boundary between the two states through the waters of Lake Erie easterly of the north cape of Maumee Bay. The language employed in the statute aforesaid is "and from the said north cape of the said Bay northeast to the boundary line between the United States and the Province of Upper Canada, in Lake Erie."

The bearing of the course starting at the North cape, by the plain meaning of the word "northeast" is North 45° East. This is also the meaning of the term as used by surveyors and in maps and charts of the day. It is the position of Defendant State of Ohio, that the most northerly cape of the Maumee Bay can be reestablished and ascertained by taking the point known to have intersected the line departing from said cape on the course North 45° East therefrom and reversing that course by running a line on the course South 45° West from said known point until the reverse line intersects the projection of the known and established land boundary line. The State of Ohio cited authority bearing upon this point in its brief filed with the Special Master.

The recommended findings of the State of Michigan ignore the term "northeast" in the statute referred to and represent a tortured construction which seems to [illegible] and the Special Master to be contrary to plain Congressional intent.

III

The State of Michigan assigns as error the Finding No. 41 of the Special Master and alleges that there is no evidence that a line drawn at Post 71 with a true bearing of South 87° 49' 44" West would ever strike the southerly extreme of Lake Michigan at present, in 1916, or in 1817.

Michigan further assigns as error the failure of the Special Master to grant that State's Findings Nos. 53, 54, 55 and certain portions of 56.

The Special Master noted that the bearing of the land portion of the boundary, at its easternmost monument, Post 71, is slightly northeasterly, being in fact, North 87° 49' 44" East, which is 2° 10' 16" North of East. The Master notes that, accordingly, if a statute had defined the line as running from the north cape of Maumee Bay in a northeasterly direction on a continuation of the same course as the land line to the international boundary line there would be force in Michigan's contention. There is, however, no such qualifying language in the act of 1836. The essential point to be considered is the fact that the statutes in question define the boundary to be a line northeast of the north cape of Maumee Bay and did not contemplate an extension from the southern tip of Lake Michigan in the same direction as the land boundary line. Under this theory the findings that Michigan wants included would seem to be not at all relevant to the basic issue in this case.

IV

Michigan assigns as error the inclusion by the Special Master in Paragraph 1 of the recommended degree the monument Turtle Island.

It is to be noted that Captain Talcott computed the latitude and longitude of the lighthouse station on Turtle Island (transcript Professor Berry, pages 52 through 54). It should be further noted that Michigan Exhibit 27 and Michigan Exhibit 8, pages 74 through 78, clearly show that Turtle Island is located at the Entrance to Maumee Bay. Further, the survey of the Maumee Bay under the direction of Captain W. S. Williams in 1844 shows the boundary line between Ohio and Michigan as beginning the course of North 45° East at the point described on the map as north cape. The boundary line shown on the Williams map following the course North 45° East from north cape bisects Turtle Island and is shown as either passing through the lighthouse on that island or very near to it. The map shows Turtle Island to have a total area of less than one acre. Ohio Exhibits 1, 2 and 3. The Ohio General Assembly joint resolution in 1933 and the identical resolution passed by the Michigan legislature in 1945 refers specifically to Turtle Island.

V

Michigan further assigns error to the Special Master in not finding the quoted portion of Michigan's request for Finding of Fact No. 34. This, basically, is the authorization in 1828 for a survey to be made of intermediate points between certain lines and the Memorial of the Ohio General Assembly which deals directly with the bearing across Lake Erie to its intersection with the northern boundary line of the United States.

Michigan does not state the reasons why it believes this particular finding should have been included. We admitted this particular allegation in our Commentary upon proposed findings of fact of the State of Michigan originally filed with the Special Master but took the position that it was neither relevant nor material to this litigation. We reiterate that position.

VI

Michigan alleges that the Special Master erred in his Recommended Decree Paragraph one. It is the position of the State of Ohio that, as stated previously, Paragraph one of the recommended decree represents a correct construction of the statutes and the plain and unambiguous meaning of the term "northeast".

VII

The State of Michigan excepts to the declaration of the Special Master beginning on page 27 of the Special Master's Report. Suffice it to say that all of the allegations in that declaration are supported by documentation in evidence in this proceeding as well as by sound legal construction.

The State of Michigan also alleges error by the Special Master in Finding No. 46 and the discussion concerning that finding beginning on page 29 et seq. of the Report of the Special Master. This finding and discussion relates to the fact that later maps have likewise indicated the boundary in Lake Erie between the two states as running North 45° East.

The Finding and Discussion of the Special Master is fully supported by the evidence. Ohio Exhibit No. 4 is a map of the "Erie Quadrangle", United States Department of Interior, Geological Survey. It was published in 1952 and bears the notation at the top of the Michigan State Highway Department, Charles M. Ziegler, State Highway Commissioner.

Ohio Exhibit No. 5 depicts the "Oregon Quadrangle", United States Department of Interior, Geological Survey, published in 1965.

Both Ohio Exhibits No. 4 and 5 portray the Ohio-Michigan boundary in Lake Erie and both clearly show that boundary as extending from Post No. 71 to the north cape of Maumee Bay and extending North 45° East.

VIII

The State of Michigan further excepts to Finding No. 38, page 18, in the Special Master's Report. This Finding relates to the Williams survey of 1844. The Williams survey is in evidence as Ohio Exhibits Nos. 1, 2 and 3 and that survey does show the boundary line between Ohio and Michigan as beginning a course of North 45° East at the point described on the map as north cape. The boundary line shown on the map following that course from north cape bisects Turtle Island, and is shown as either passing through the lighthouse on this Island or very near to it.

The State of Michigan further assigns as error the failure of the Special Master to find the requested Findings of Fact of the State of Michigan Nos. 45, 47, 48 and 49. In the Commentary of the State of Ohio upon these findings filed with the Special Master we objected to them on the ground they were conclusionary and based by and large upon the opinion testimony of Professor Berry, which testimony we dispute. Our answer to Michigan's contention may be based simply upon the plain meaning of the term "northeast" in the statutes of 1835-36. One does not have to go through a construction and interpretation of the Talcott survey to ascertain the plain meaning and intention of Congress.

RELIEF

WHEREFORE, it is prayed that the recommendations of the Special Master be approved in accordance with the Findings, Conclusions, and Recommended Decree of said Special Master and that a decree be entered by this court in conformance therewith.

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BY

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